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Nos. 96-1595 and 96-1596

In the Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF ARIZONA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

STATE OF CALIFORNIA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners' contention that the federal government has violated the Invasion Clause of Article IV, Section 4 of the Constitution by failing to prevent the presence of illegal aliens in the States of California and Arizona presents a justiciable claim.

2. Whether the federal requirement that States must provide emergency medical treatment for illegal aliens under the Medicaid program if they are to receive federal Medicaid funds, or the fact that the State incurs substantial costs in incarcerating illegal aliens who commit crimes within the State, violates the Tenth Amendment.

3. Whether petitioners' claim that the Attorney General should use a lump-sum appropriation earmarked for the general enforcement of the immigration laws by the Immigration and Naturalization Service (INS) to reimburse States for the costs of incarcerating illegal aliens for violation of state-law offenses is subject to judicial review under the Administrative Procedure Act.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	7
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Baker v. *Carr*, 369 U.S. 186 (1962)	8
Barclays Bank PLC v. *Franchise Tax Bd. of Cal.*, 512 U.S. 298 (1994)	9
Chiles v. *United States*:	
874 F. Supp. 1334 (S.D. Fla. 1994), aff'd, 69 F.3d 1094 (11th Cir. 1995), cert. denied, 116 S. Ct. 1674 (1996)	8
69 F.3d 1094(11th Cir. 1995), cert. denied, 116 S. Ct. 1674 (1996)	15
Fiallo v. *Bell*, 430 U.S. 787 (1977)	8
Harris v. *McRae*, 448 U.S. 297 (1980)	11
Hodel v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981)	10, 11
Lincoln v. *Vigil*, 508 U.S. 182 (1993)	7, 14
Mathews v. *Diaz*, 426 U.S. 67 (1976)	9
New Jersey v. *United States*, 91 F.3d 463 (3d Cir. 1996)	15
New York v. *United States*, 505 U.S. 144 (1992)	10, 11
Oklahoma v. *Civil Serv. Comm'n*, 330 U.S. 127 (1947)	11
Padavan v. *United States*, 82 F.3d 23 (2d Cir. 1996)	15
Sale v. *Haitian Centers Council, Inc.*, 509 U.S. 155, 188 (1993)	9
Steward Mach. Co. v. *Davis*, 301 U.S. 548 (1937)	12

Cases—Continued: Page

South Dakota v. *Dole*, 483 U.S. 203 (1987) 11, 12
Texas v. *United States*, 106 F.3d 661 (5th Cir. 1997) 15
United States v. *Lopez*, 514 U.S. 549 (1995) 10
Wilder v. *Virginia Hosp. Ass'n*, 496 U.S. 498 (1990) 11

Constitution, statutes, regulation and rule:

U.S. Const.:
Art. I :
§ 8, Cl. 1 (Spending Clause) 11
§ 8, Cl. 15 9
§ 9, Cl. 2 9
Art. IV, § 4 (Invasion Clause) 2, 3, 5, 6, 7, 8, 9, 15
Amend. X ..... *passim*
Administrative Procedure Act, 5 U.S.C. 702 4
Department of Justice and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-317, Tit. VIII, 108 Stat. 1778 13
Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 101(a), 110 Stat. 3009-14 15
Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796:
§ 20102, 108 Stat. 1816 15
§ 20103, 108 Stat. 1817 15
§ 20301(a), 108 Stat. 1823 14
8 U.S.C. 1252(j) 14, 15
8 U.S.C. 1365 ..... 3, 5, 13
8 U.S.C. 1365(a) 3, 13, 14
42 U.S.C. 1396 11
42 U.S.C. 1396b(v) 11
42 C.F.R. 440.255(c) 11
Fed. R. Civ. P. 12(b)(6) 3

Miscellaneous:

	Page
142 Cong. Rec. H3846 (daily ed. Apr. 25, 1996)	15
1 S. Johnson, *A Dictionary of the English Lanaguage* (1755)	9-10
State Criminal Alien Assistance Program, 59 Fed. Reg. 50,830 (1994)	13

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in No. 96-1596 (Pet. App. 1-24[1]) is reported at 104 F.3d 1086. The order of the court of appeals in No. 96-1595 (96-1595

[1] Except as otherwise indicated, references to "Pet. App." are to the Appendix to the Petition in No. 96-1596.

Pet. App. 1) is reported at 104 F.3d 1095. The opinion of the district court in No. 96-1596 (Pet. App. 1-49) is unreported. The opinion of the district court in No. 96-1595 (96-1595 Pet. App. 24-36) is unreported.

JURISDICTION

The judgments of the court of appeals in both cases were entered on January 7, 1997. The petitions for a writ of certiorari in both cases were filed on April 7, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioners in No. 96-1596—the State of California, Governor Pete Wilson, the state director of finance, and officials of state youth, correctional, and public health agencies—brought suit asserting a variety of constitutional and statutory claims against the United States and federal officials with regard to the migration of illegal aliens into California. Among other contentions, petitioners claimed that the federal government's failure to prevent an influx of illegal aliens into California constitutes a violation of the Invasion Clause of the Constitution. Pet. App. 11. That Clause provides that the United States shall "guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion." Art. 4, § 4.

Petitioners also alleged violations of the Tenth Amendment. They claimed that the United States had unconstitutionally conditioned California's receipt of federal Medicaid funds on the State's provision and partial funding of emergency medical care under the Medicaid program to needy illegal aliens. Petitioners also claimed that federal immigration policy violates the Tenth Amendment because it

causes the State to incur the costs of incarcerating illegal aliens who commit crimes within the State. Pet. App. 15-17.

Petitioners' complaint sought reimbursement for the State's costs of providing emergency medical care, public education, and incarceration to illegal aliens. Petitioners also sought a declaration that the Attorney General violated 8 U.S.C. 1365, which authorizes distribution of appropriated funds to the States to compensate them for the costs of incarcerating illegal aliens convicted of state felonies, because she had failed to provide petitioners with reimbursement out of funds that were available but that had not been specifically appropriated for that purpose. Pet. App. 8-11.[2]

b. In No. 96-1596, the district court granted the federal government's motion to dismiss petitioners' complaint under Federal Rule of Civil Procedure 12(b)(6). Although the court rejected petitioners' contention that the illegal migration of aliens into the United States constitutes the sort of "invasion" that could trigger Article IV, Section 4, see Pet. App. 32-34, the court ultimately held that the Invasion Clause claim presents "a non-justiciable, political question solely in the hands of Congress and the Executive Branch." *Id.* at 34. The court explained that the Constitution commits matters concerning immigration to Congress, not the courts, and that in any event "there

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[2] Section 1365(a) provides:

> Subject to the amounts provided in advance in appropriation Acts, the Attorney General shall reimburse a State for the costs incurred by the State for the imprisonment of any illegal alien or Cuban national who is convicted of a felony by such State.

is simply no judicially * * * manageable standard to determine at what point a migration becomes an invasion under Article IV." *Id.* at 35.

The district court also rejected petitioners' Tenth Amendment claims. Pet. App. 37-39. The court held that the statute conditioning a State's receipt of federal Medicaid funds on its agreement to provide medical care for needy illegal immigrants is a "valid condition" on receipt of federal funds that "is not coercive for purposes of the Tenth Amendment." *Id.* at 37, 38. The court noted that petitioners' argument that the condition is invalid would lead to the unusual conclusion "that the Federal Government couldn't even eliminate its allocation of Medic[aid] funds because the states are dependent." *Id.* at 38. The court rejected petitioners' claim that the United States is responsible under the Tenth Amendment for their incarceration of illegal aliens who commit crimes, "because the cost of incarcerating illegal aliens stems not from federal law but from the State's obligation to enforce its own law and its prosecution of illegal aliens for state criminal offenses." *Id.* at 41.

Finally, the district court held that petitioners' claims for reimbursement of the costs of educating, incarcerating, and providing health care are in any event barred by sovereign immunity. The court noted that the Administrative Procedure Act, 5 U.S.C. 702, does not provide a waiver of the United States' sovereign immunity from monetary claims and that petitioners' claims, though pleaded "as equitable and in the nature of restitution and reimbursement," are "in fact claims for money damages, against which [respondents] are immune." Pet. App. 47-48.

2. a. Petitioners in No. 96-1595—the State of Arizona, Governor Fife Symington, III, and the directors

of state correctional and youth agencies—brought a suit similar to that brought by the California plaintiffs, asserting similar constitutional and statutory claims against the United States and federal officials with regard to the migration of illegal aliens into Arizona.

b. In No. 96-1595, the district court rejected petitioners' claims. 96-1595 Pet. App. 24-36. With respect to the Invasion Clause claim, the court held that "[petitioners'] challenge under the Invasion Clause presents a political question best left to the political branches." *Id.* at 30. The court noted that "Congress possesses complete legislative authority over the admission of aliens," *id.* at 29, and that "no judicially manageable standards exist for the [c]ourt to apply to determine if and when a migration of immigrants becomes an 'invasion,'" *id.* at 30. The court also rejected petitioners' Tenth Amendment claim regarding the costs of incarcerating illegal aliens, holding that "the [federal] Government has not 'commandeered' Arizona's legislative process" and that "[t]he cost of incarcerating illegal aliens results not from federal law but from Arizona's own decision to prosecute illegal aliens for criminal offenses defined by Arizona law." *Id.* at 32.

The court also held that sovereign immunity barred petitioners' claim for reimbursement under 8 U.S.C. 1365. 96-1595 Pet. App. 33-34. With respect to petitioners' claims that they are entitled to funds that had not been specifically appropriated under Section 1365 to pay the costs of incarcerating illegal aliens, the court noted that the funds sought had been appropriated under lump-sum appropriations laws. The court therefore held that the decision regarding

allocation is committed to agency discretion and not subject to judicial review. *Id.* at 34-35.

3. The court of appeals affirmed in the California case, in a published opinion. Pet. App. 1-24. The court concluded that California's Invasion Clause claim is nonjusticiable. *Id.* at 11-13. The court explained that "[f]or this [c]ourt to determine that the United States has been 'invaded' when the political branches have made no such determination would disregard the constitutional duties that are the specific responsibility of other branches of government, and would result in the [c]ourt making an ineffective non-judicial policy decision." *Id.* at 12. The court also noted that "there are no manageable standards to ascertain whether or when an influx of illegal immigrants should be said to constitute an invasion." *Ibid.*

The court of appeals affirmed the dismissal of petitioners' Tenth Amendment claims on the merits. With respect to the Medicaid-based claims, the court concluded that, under settled law, the conditioning of Medicaid funds on California's agreement to provide medical care for needy illegal immigrants was not "coercion" of the State that could violate the Tenth Amendment. Pet. App. 15-17. Noting that "no party challenging the conditioning of federal funds has ever succeeded under the coercion theory," *id.* at 16, the court held that the present record failed to disclose the kind of "extraordinary" circumstances under which such coercion could be found. *Ibid.* With respect to the Tenth Amendment claims based on the costs of incarcerating illegal aliens, the court held that, "because no federal mandate requires California to pursue a penal policy resulting in" the State's incurring costs to incarcerate illegal aliens, petitioners

failed to allege a Tenth Amendment claim based on the fact that the State incurred those costs. *Id.* at 17.

With respect to petitioners' claim to reimbursement from lump-sum appropriations for expenses of incarcerating illegal aliens, the court agreed with the district court that "the Attorney General's decision to allocate monies generally appropriated to her in a lump-sum for the administration of the immigration laws for the specific purpose of reimbursing a State for the costs of incarcerating illegal aliens under 8 U.S.C. § 1365 is 'committed to agency discretion by law' and is not subject to judicial review under the Administrative Procedure Act, 5 U.S.C. § 701(a)(2)." Pet. App. 19-20 (citing *Lincoln* v. *Vigil*, 508 U.S. 182, 192 (1993)).

4. The court of appeals affirmed in the Arizona case in a brief order (96-1595 Pet. App. 1-2), "[f]or the reasons set forth in" the court's opinion in the California case. See also Pet. App. 7 n.1 (explaining that the substantive issues were addressed in the opinion in the California case because California presented claims in addition to those presented by Arizona).

ARGUMENT

The decision of the court of appeals is correct and is consistent with rulings of the Second, Third, Fifth and Eleventh Circuits, all of which have affirmed dismissal of similar claims. Further review is not warranted.

1. Petitioners contend (96-1596 Pet. 10-24; 96-1595 Pet. 16-18, 21-22) that by failing to halt the influx of illegal immigrants into California and Arizona, the federal government has breached its constitutional duty to "protect each [State] against Invasion." U.S. Const. Art. IV, § 4. As both district courts and the

court of appeals concluded, that claim presents a nonjusticiable political question. Pet. App. 11-13, 34-35.

The Constitution provides no "judicially discoverable and manageable standards for resolving" petitioners' claim. *Baker* v. *Carr*, 369 U.S. 186, 217 (1962). In particular, the Constitution provides no criteria for determining when, if ever, a peacetime influx of migrants should be deemed to have risen to the level of an "invasion," or for assessing the adequacy of the federal government's response to such a threat. Adjudication of such a claim would require a court to "review the * * * entire enforcement of Federal immigration laws including the enforcement methods used and their effectiveness, determine the reasonableness of budget allocations, determine whether more resources are available and, if so, decide how those addition[al] resources should be allocated." *Chiles* v. *United States*, 874 F. Supp. 1334, 1344 (S.D. Fla. 1994), aff'd, 69 F.3d 1094 (11th Cir. 1995), cert. denied, 116 S. Ct. 1674 (1996). The Constitution provides no yardstick for determining when the federal government's indisputably massive expenditures on immigration control should be deemed a sufficient response under the Invasion Clause (even if we assume, *arguendo*, that the Clause applies in this setting), and it provides no means for determining what additional efforts should be compelled.

In addition, there is a "textually demonstrable constitutional commitment of the issue [of immigration and its control] to a coordinate political department." *Baker* v. *Carr*, 369 U.S. at 217. As this Court held in *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977), "'over no conceivable subject is the legislative power of Congress

more complete than it is over' the admission of aliens." See also *Mathews* v. *Diaz*, 426 U.S. 67, 81-86 (1976) (Constitution commits to the federal government the exclusive power to control immigration). Admission of aliens into the United States and control over the borders are matters firmly entrusted to the political branches. And protection of the United States from illegal immigration implicates matters of foreign policy and defense into which courts will intrude only with the greatest reluctance. See, *e.g.*, *Barclays Bank PLC* v. *Franchise Tax Bd. of Cal.*, 512 U.S. 298, 327-328, 330-331 (1994); *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155, 188 (1993).

Finally, as the court of appeals recognized (Pet. App. 13), petitioners' claim misapprehends the intent of the Invasion Clause. The Constitution commits the national defense to the United States, and the Invasion Clause recognizes that it is the United States' role to protect against invasion. See also Art. I, § 8, Cl. 15 (listing among enumerated powers of Congress "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions"). The conclusion that the Constitution refers to "invasion" in the sense of a hostile, presumably military invasion also is supported by its use in Art. I, § 9, Cl. 2, which provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[3]

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[3] That understanding of "invasion," as used in the Constitution, is fully consistent with 18th century usage. Dr. Johnson defined "invasion" as a "[h]ostile entrance upon the rights or possessions of another; hostile encroachment." 1 S. Johnson, *A*

2. a. The California petitioners contend (96-1596 Pet. 25-29) that their expenditures on emergency medical care for illegal aliens pursuant to the Medicaid program, coupled with the federal government's failure to halt all illegal immigration, contravenes the Tenth Amendment. The court of appeals correctly held that petitioners failed to state a claim under the Tenth Amendment.

Under this Court's Tenth Amendment jurisprudence, "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *New York* v. *United States*, 505 U.S. 144, 161 (1992) (quoting *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)). See also *United States* v. *Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring) (*New York* v. *United States* involved "a formal command from the National Government directing the State to enact a certain policy"). Petitioners, however, identify no federal directive to the States regarding the treatment of illegal aliens, much less a directive that would commandeer the State's legislative or policy-making apparatus. The federal immigration policies at issue in this case do not require petitioners to enact or enforce a federal regulatory program.

The fact that the State may obtain federal Medicaid funds only subject to the condition that it provide emergency medical care under the Medicaid program to needy illegal aliens is not an unconstitutional

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Dictionary of the English Language (1755). Similarly, Dr. Johnson's primary definition of "invade" is "[t]o attack a country; to make an hostile entrance. He will *invade* them with troops." *Ibid.*

federal directive to the States that "commandeers" California's legislative or policy-making apparatus.[4] Medicaid is a voluntary federal spending program in which States may decline to participate. *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 502 (1990); *Harris* v. *McRae*, 448 U.S. 297, 301 (1980). In exercising its powers under the Spending Clause, U.S. Const. Art. I, § 8, Cl. 1, Congress may "attach conditions on the receipt of federal funds." *South Dakota* v. *Dole*, 483 U.S. 203, 206 (1987). Federal actions that "encourage" or "provide incentives" for States to adopt certain policies do not violate the Tenth Amendment. See *New York* v. *United States*, 505 U.S. at 174-176; see also *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 292 n.33 (even if the statute's "requirements will have a measurable impact on [the State's] economy, this kind of effect, standing alone, is insufficient to establish a violation of the Tenth Amendment"). Although those conditions "may influence a State's legislative choices," such influence does not violate the Tenth Amendment. *New York* v. *United States*, 505 U.S. at 167. See also *id.* at 171-173; *Oklahoma* v. *Civil Serv. Comm'n*, 330 U.S. 127, 142-44 (1947).

Petitioners argue (96-1596 Pet. 27) that, as a practical matter, California would not make the decision to

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[4] States choosing to participate in the Medicaid program are reimbursed with federal funds for a percentage of their costs in providing medical services to the needy. See 42 U.S.C. 1396. States are reimbursed for medical services provided to illegal aliens, but only for those services necessary to care for emergency conditions. 42 U.S.C. 1396b(v). Concomitantly, a State that wishes to receive Medicaid funds must provide emergency (but not non-emergency) medical services to illegal aliens. 42 C.F.R. 440.255(c).

forgo federal Medicaid funds and that the requirements of the Medicaid program thus constitute impermissible coercion. But "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." *Dole*, 483 U.S. at 211 (quoting *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 589-590 (1937)). California has voluntarily elected to participate in the Medicaid program, presumably concluding that its benefits outweigh its costs. As the district court observed, petitioners' "acceptance of the Federal Government's $30 billion Medicaid grant is conditioned on California spending $1.7 billion for emergency Medicaid to illegal aliens." Pet. App. 38. California may not evade those costs by characterizing them as the product of unlawful coercion.

b. The Arizona petitioners contend (96-1595 Pet. 19, 20) that the federal government has "impermissibly shift[ed] the burden of implementing its immigration policy onto the State" by requiring the State, "at no economic or political cost to the federal government, [to] retain thousands of illegal inmates in its criminal justice system."

The court of appeals correctly held (Pet. App. 17) that petitioners failed to state a claim under the Tenth Amendment. The federal government has issued no directive to the States regarding the incarceration of illegal aliens, much less a directive that would commandeer the State's legislative or policymaking apparatus. The federal immigration policies at issue here are administered by federal agencies; their implementation does not require Arizona to enact or enforce a federal regulatory program.

As the court of appeals recognized, a State cannot properly premise a Tenth Amendment claim on its decision to expend resources to deal with problems

created by illegal aliens within the State's borders. The Tenth Amendment provides a shield against impermissible federal directives, not a sword to compel federal action. Concerns of the kind presented here by Arizona are dealt with through the political process. And, as noted below, see pp. 14-15 & n.5, *infra*, the political process has indeed resulted in a massive commitment of federal resources to the problem of illegal aliens incarcerated by the States for violations of state law.

3. Petitioners in the Arizona case argue (96-1595 Pet. 13-16) that they are entitled to a declaration that, in addition to any funds that Congress may specifically appropriate under 8 U.S.C. 1365 to reimburse the States for their costs of incarcerating illegal aliens, various lump-sum congressional appropriations are also available to provide funds for that purpose.

Under Section 1365, the Attorney General is authorized to reimburse the States for the costs of incarcerating illegal aliens convicted of state crimes. Section 1365, however, does not appropriate any funds, and it is expressly made "[s]ubject to the amounts provided in advance in appropriation Acts." 8 U.S.C. 1365(a). Congress enacted a specific appropriation of $130 million under Section 1365 for Fiscal Year 1995. Department of Justice and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-317, Tit. VIII, 108 Stat. 1778. See State Criminal Alien Assistance Program, 59 Fed. Reg. 50,830, 50,833 (1994). For Fiscal Year 1994, however, as for previous years, Congress appropriated no monies for distribution pursuant to 8 U.S.C. 1365.

Petitioners argue (96-1595 Pet. 13-16) that the Attorney General should have been required to dis-

tribute to the States, pursuant to 8 U.S.C. 1365(a), monies from the lump-sum appropriation made to the INS for salaries and expenses in fiscal year 1994. The court of appeals properly rejected that claim. By its terms, Section 1365(a) limits the Attorney General's authority to distribute monies to "amounts provided in advance in appropriation Acts." 8 U.S.C. 1365(a). Moreover, the court of appeals correctly reasoned that, even assuming that the Attorney General would have authority to make the distribution that petitioners sought, her decision not to use funds from lump-sum appropriations for purposes described in Section 1365(a) would be committed to agency discretion by law. 96-1595 Pet. App. 17. That conclusion is fully consistent with this Court's decision in *Lincoln* v. *Vigil*, 508 U.S. 182 (1993), in which the Court emphasized that the courts have "no leave to intrude" on an agency's allocation of a lump-sum appropriation, as long as the agency acts "to meet permissible statutory objectives." *Id.* at 193. The Attorney General's use of funds appropriated for INS salaries and expenses for the very purposes identified by Congress does not give rise to a reviewable claim.

Petitioners' contention is particularly anomalous in light of the fact that Congress has appropriated large sums in the years since this suit was filed for the specific purpose of helping States and localities deal with illegal aliens incarcerated for violations of state or local law. In the Violent Crime Control and Law Enforcement Act of 1994, Congress created a new statutory mechanism for that purpose and authorized amounts to be appropriated by Congress for Fiscal Year 1996 and following years. See Pub. L. No. 103-322, § 20301(a), 108 Stat. 1823-1824, adding 8 U.S.C. 1252(j). Congress appropriated a total of $500

million to fund Section 1252(j) in both Fiscal Year 1996 and Fiscal Year 1997.[5]

4. The ruling of the court of appeals is consistent with that of the four other courts of appeals that have addressed similar claims. See *Chiles* v. *United States*, 69 F.3d 1094 (11th Cir. 1995) (rejecting Invasion Clause and Tenth Amendment claims), cert. denied, 116 S. Ct. 1674 (1996); *Padavan* v. *United States*, 82 F.3d 23 (2d Cir. 1996) (same); *New Jersey* v. *United States*, 91 F.3d 463 (3d Cir. 1996) (same); *Texas* v. *United States*, 106 F.3d 661 (5th Cir. 1997) (rejecting Tenth Amendment claims). The Court denied review in the *Chiles* case last Term. There is no reason for a different disposition here, especially in light of the intervening decisions of other courts of appeals reaching the same result.

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[5] For Fiscal Year 1996, Congress appropriated $300 million for Section 1252(j). 142 Cong. Rec. H3846 (daily ed. Apr. 25, 1996). Congress also authorized an appropriation of an additional $200 million from the Violent Offender Incarceration and Truth-In-Sentencing Incentive Grants established by the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §§ 20102, 20103, 108 Stat. 1816-1817. 142 Cong. Rec. H3846 (daily ed. Apr. 25, 1996). For Fiscal Year 1997, Congress appropriated $330,000,000 "for the State Criminal Alien Assistance program, as authorized by section 242(j) of the Immigration and Nationality Act." Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 101(a), 110 Stat. 3009-14. In addition, Congress provided that "$170,000,000 shall be available for payments to States for incarceration of criminal aliens." *Ibid.*

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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